INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT:	
1. Why Petitioners Are Liable	8
2. The Rule Allowing Recovery by Public Figures Applies	11
3. Free Elections and False Defamations	12
4. Official Conduct, Public Interest and Perjury	15
5. Miscellaneous Considerations	18
CONCLUSION	18

CITATIONS

	Page
CASES:	
All Diet Foods v. Time (1968) 290 N.Y. Supp. 2d. 445	16
Associated Press v. Walker (1967) 388 U.S. 130	16, 17
Beckley Newspapers Corp. v. Hanks (1967) 389 U.S. 81	2, 16

Page

Bon Air v. Time (S.D. Ga. 1969) 295 F. Supp. 704, affd. C.A. 5 - 5-6-70 .... F. 2d 16, 17

Curtis Publishing Co. v. Butts (1967) 388 U.S. 130 ..... 11, 12, 17

Farnsworth v. Time (Ill. 1969) 253 N.E. 2d. 408.... 17

Fotochrome v. N. Y. Herald Tribune (1969) 305 N.Y. S. 2d. 168 17

Garrison v. Louisiana (1964) 379 U.S. 64 16

Greenbelt v. Bresler (5-18-70) .... U.S. .... Case No. 413 October Term, 1969 ..... 2, 10, 17

Henry v. Collins (1965) 380 U.S. 356 16

Merritt-Chapman v. Associated Press (C.C. Fla. 1970) 33 Fla. Supp. 102 ..... 17, 18

New York Times v. Connor (1966) 365 F. 2d. 567 16

New York Times Co. v. Sullivan (1964) 376 U.S. 254 ..... 2, 8, 11, 14, 15, 16, 17

Rosenblatt v. Baer (1966) 383 U.S. 75 16

St. Amant v. Thompson (1968) 390 U.S. 727 16

Time v. Hill (1967) 385 U.S. 374..... 17

Time v. McLaney (1969) 406 F. 2d. 565 17

United Medical v. C.B.S. (1968) 404 F. 2d. 706 17

Washington Post v. Keogh (1966) 365 F. 2d. 965.... 16

Wasserman v. Time (C.A.D.C. 3-30-70) .... F. 2d. 17

MISCELLANEOUS:

United States Constitution — Article IV, Section 4.... 12

United States Constitution — First Amendment..... 3

United States Constitution —
Fourteenth Amendment 3

United States Constitution —
Fifteenth Amendment 12

United States Constitution —
Nineteenth Amendment 12

Florida Constitution — Article III, Section 26 12

Florida Statutes (1965) Section 104.061(1) 12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 1373

OCALA STAR-BANNER COMPANY,
a corporation, and LOYAL PHILLIPS,

Petitioners,

vs.

LEONARD DAMRON,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

Granted May 4, 1970

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the District Court of Appeal, First District, State of Florida, is reported at 221 So. 2d. 459. (A. 18) The opinion of the Florida Supreme Court refusing to review said decision (SC 8) is reported at 231 So. 2d. 822. (A. 21) The following symbols will be used:

"R" for trial clerk's certified record (Volume I)

"TT" for court reporter's separate volumes of trial transcript (Volumes II and III)

"DC" for record volume in the District Court of Appeal (Volume VI)

"SC" for the record in the Florida Supreme Court

"A" for the printed Appendix in this Court

JURISDICTION

The Respondent raised the question of this Court's jurisdiction in Respondent's Brief in Opposition because of Petitioners' failure to timely raise a federal constitutional question. This point is not restated here because this Court has taken the position it will make an independent examination of the whole record . . . so as to assure themselves that judgment does not constitute a forbidden intrusion on the field of free expression. *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 at 285; *Beckley Newspapers Corp. v. Hanks* (1967) 389 U.S. 81 at 82; *Greenbelt v. Bresler* (5-18-70) .... U.S. .... Case No. 413 October Term, 1969.

QUESTIONS PRESENTED

1. Does a libel judgment against newspaper Petitioners in favor of Respondent Mayor and candidate for County Tax Assessor (primarily covering damages for loss of election) deprive Petitioners of their Constitutional rights where the record contains no evidence of (or even consideration given to necessity for) actual malice as defined by this Court?

2. Does the State Court's instruction to a jury (affirmed by the District Court of Appeal) that it must return a libel verdict against Petitioners in favor of Respondent Mayor and candidate for County Tax Assessor without any regard for

actual malice, as defined by this Court, deprive Petitioners of their Constitutional rights?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."

Amendment XIV:

> ". . . (N) or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Respondent, Leonard Damron, the Mayor of Crystal River, recovered a jury verdict for $22,000.00 in compensatory damages and judgment was entered thereon against Petitioners after a trial on only the issues of damages. (R. 18-19, A. 14) The Petitioners prior to trial had admitted their liability as to compensatory damages. (TT. 274, A. 80) This action was originally filed by Respondent on July 29, 1966, and was tried in January of 1968.

The Petitioners first raised their argument that a federal constitutional question existed in their Motion for New Trial filed February 2, 1968. (R. 20-21, A. 15) A Motion to Dismiss and a Motion to Strike (R. 7-8, A. 10-11) were filed by Petitioners, however, both of these motions were completely void of any federal constitutional question being stated therein or argued and thus being raised at the time of these motions, as required by the Florida Rules of Civil Procedure in effect at the time these motions were filed. (A. 23) The

Petitioners' Answer (R. 10-12, A. 12-13) did not raise any federal constitutional questions and no jury instructions relating to a federal constitutional question were requested, as required by the rules for the assignment of error. (A. 25)

The trial court granted Respondent's Motion to Amend his Complaint without Petitioners' objection at the close of Respondent's case in chief to conform with the evidence to extend the Respondent's damages to include embarrassment, mental anguish and upset. (TT. 145-146, A. 70)

The Petitioners' news reporter, Lucy Ware, for several months before the publication of the defamatory false news article on April 18, 1966, (TT. 10, A. 28 and Respondent's Exhibit 3, A. 84) had been improperly reporting events relating to Respondent. (TT. 15-18, A. 30-32 and TT. 52-53, A. 54) This improper reporting was called to the attention of Petitioners by the Respondent prior to the publication on April 18, 1966, of the defamatory article sued upon. (TT. 15, A. 30-31) On January 30, 1966, Petitioners published a news article prepared by Lucy Ware correctly reporting the facts and clearly indentifying James Damron as the party involved. (Petitioners' Exhibit 1, A. 85, and TT. 148, A. 70)

The defamatory false article sued upon was published 13 days after it was a news fact. (TT. 35, A. 43) The court event of passing over the case occurred on April 5th and the article was published on April 18th. The Respondent was a candidate for the public office of tax assessor at the time this defamatory article was published. The election day was on May 3rd, 15 days after the false article was published. (TT. 37, A. 44)

The reporter, Lucy Ware, testified that she used two procedures for transmitting a news story to the Petitioner newspaper. "If the story is not of particular news interest, I

generally type it and mail it in since the mail service is one day. If the story is of particular news value, I phone it in early in the mornings." (TT. 150, A. 72) The news story sued upon was telephoned to the Petitioner newspaper. (TT. 151, A. 72)

Lucy Ware further testified that in the conversation with Mr. Meier when she telephoned in the defamatory false news story she was informed to change the dateline in that story from Gainesville (where the action had actually occurred) to Inglis. (Respondent's Exhibit 3, A.84 and TT. 152, A. 72)

Fred Meier, the Petitioners' area editor who received the defamatory false news story from the reporter, Lucy Ware, over the telephone testified he had a mental aberration and changed the name from James Damron to Leonard Damron. He further testified that he had handled quite a few news stories about Leonard Damron, (TT. 162-163, A. 75-76) but on cross examination he testified that he knew the Respondent, Leonard Damron, lived in Crystal River and the story was datelined Inglis. He further testified that he had been in the newspaper business 37 years and he made the change in names without checking. (TT. 166, A. 76)

The Respondent's witness, Land, a newspaper reporter, testified that you don't change names in the trade of news journalism without checking your source. (TT. 132-133, A. 68-69)

The Petitioners published in their newspaper on April 24, 1966, a letter to the editor written by Glenn Bland under the title, "So Sorry" without denial of its contents at the time of the publication. This letter spelled out the policy of the Petitioners when it stated, "You evidently believe in the policy of lies, misquotes, carelessness and distortion because you con-

tinue to do it." (Petitioners' Exhibit 4, A. 86, TT. 140-141, TT. 183, A. 69)

The election day on which the Respondent was running for the public office of tax assessor was on May 3, 1966. Respondent had always been a successful candidate in elections prior to the publication of the defamatory false news article and received voter acceptance by large margins. (TT. 25-28, A. 37, 38, 39) A very cold reaction resulted from the voting public as a result of this article. (TT. 24, A. 36) The Respondent was defeated in this election. (TT. 25, A. 37) The routine comment was that Mr. Damron was running for office and they didn't care to vote for a man like that. (TT. 105-106, A. 65) The defamatory false article degraded the Respondent in the public eye and was a general comment of the public. (TT. 109-110, A. 66)

The printing of the retraction to the defamatory false article had no effect on the damage created by the defamatory false article. (TT. 112, A. 67) The Respondent as a result of this article had lost general public acceptance. (TT. 117, 123, A. 67-68) The contents of the defamatory false article traveled like wild fire (TT. 130, A. 68) with the reaction that the Respondent was a nut running for public office when under federal indictment. (TT. 129, A. 68) These comments continued up to the actual election. (TT. 130, A. 68)

The Respondent felt that the defamatory false news article had ruined him, he couldn't sleep, couldn't eat; (TT. 12, A. 29) Respondent and his family were severely mentally affected, embarrassed and his business was injured; (TT. 21-23, A. 35, 36) and Respondent's business suffered as a result of this article. (TT. 28-30, A. 39, 40)

The Respondent was a well-known personality and enjoyed a good reputation. (TT. 66, A. 61 and TT. 87, A. 63) Respondent had a reputation for honesty. (TT. 92, A.

64) The public spoke well of the Respondent prior to the publication of the article and poorly of him after the publication of the article. (TT. 67-68, A. 61, and TT. 93-94, A. 64)

The defamatory false news article had an adverse affect upon Respondent's personality and appearance. (TT. 69, A. 62) Prior to the publication of the article, Respondent was optimistic and had a generally good mental attitude. After the publication of the article he was very upset mentally, nervous, brokenhearted aand browbeaten. (TT. 89, A. 63, and TT. 93, A. 64) After the article Respondent was concerned, wasn't his old self and seemed worried. (TT. 99, A. 65) Petitioners' witness, Hood, testified that Respondent was concerned and that the article worried him. (TT. 211, A. 77)

The District Court of Appeal affirmed the decision of the trial court on the basis of the article being about a public official and contained no comment relating to official conduct of the Respondent. (A. 18, DC 1)

The Florida Supreme Court dismissed this appeal confirming the decision of the District Court of Appeal that there had been no construction of the United States Constitution by that Court. (A. 21, SC 8)

SUMMARY OF ARGUMENT

The evidence supports the Petitioners' admission of liability in this cause because the Petitioners knew at the time that the defamatory falsehood they published was either false or was published with a reckless disregard of whether it was false or not, showing a highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

The freedom of speech and press are not absolute rights but are subject to the constitutional right guaranteeing our

Nation's republican form of government by requiring free elections unfettered by falsehoods calculated to defame the reputation of a candidate for public office.

The charging of a public official or candidate for public office with a libelous defamatory falsehood of a perjury indictment on a matter unrelated to the office held or sought is a private libel and does not abridge the freedom of speech or other freedoms protected by the First Amendment to the United States Constituton.

ARGUMENT

1. Why Petitioners Are Liable

The fact Petitioners admitted their liability before trial is evident from the statement of the trial judge when he entered a direct verdict on the question of liability for the Respondent and stated, "Well, I think liability as to compensatory damages is admitted in this case." The Petitioners' trial attorney did not object to this statement or the directed verdict, rather Petitioners' trial attorney entered into a discussion of how the jury instructions on the question of compensatory and punitive damages would be worded. (TT. 274-277, A. 80, 81)

This Court has ruled that where a statement was made with actual malice, that is with the knowledge that it was false or with reckless disregard of whether it was false or not, that the publisher of the defamatory material would be liable. (*New York Times Co. v. Sullivan* 376 U.S. 254 at 279)

A review of the testimony in evidence in this trial discloses that the reporter, Lucy Ware, for several months prior to the publication of the defamatory false news article had been improperly reporting events relating to the Respondent.

Further, that on January 30, 1966, Petitioners published a story properly identifying Respondent's brother, James Damron, a relatively unknown individual, as having been indicted for the crime of perjury. This news story was written in normal form with an average size headline. (Petitioners' Exhibit 1, A. 85)

An examination of the defamatory false news article sued upon published on April 18, 1966, (Respondent's Exhibit 3, A. 84) shows that a composition of the article itself was a three-column spread with a banner headline directed to call attention to the Respondent as being the party involved.

A further examination of the testimony of Lucy Ware, the news reporter, and Fred Meier, the area editor, shows that there was a discussion at the time the defamatory false news article was transmitted to Fred Meier by telephone regarding the dateline. Lucy Ware testified that she was instructed in this conversation to change the dateline from Gainesville to Inglis where James Damron resided. (TT. 152, A. 72) Obviously when this discussion ensued, it is hardly conceivable that Fred Meier could have had a mental aberration and changed the name from James to Leonard when Fred Meier, by his own testimony, admitted he was well familiar with the fact that Leonard Damron, the Respondent, resided in Crystal River, for he, Fred Meier, had written several articles about Leonard Damron during the period of time he had been employed by the Petitioner newspaper. Fred Meier admitted on the witness stand that he had spent 37 years in the newspaper business and that he changed the name to identify the Respondent as the party involved in a perjury matter. (TT. 162-163, A. 75-76, and TT. 166, A. 76)

The Respondent's witness, Land, a newspaper reporter, testified that changing a name without checking just was not done in news journalism. (TT. 132-133, A. 68-69)

How more conclusive can the facts be that Petitioners were liable for their act in publishing this defamatory falsehood when they themselves on the 24th day of April, 1966, published the letter to the editor from Glenn Bland without any denial of its contents wherein Glenn Bland charged the Petitioners with a policy of lies, misquotes, carelessness and distortion because they continued to do it. (A. 69, Petitioners' Exhibit 4, A. 86)

The facts in this case are clearly distinguishable from the facts set down in the *Greenbelt v. Bresler* case. (*Greenbelt v. Bresler* (5-18-70) Case No. 413 October Term, 1969, ... U.S. ....) In the *Greenbelt* case the news articles relating to the Respondent, Bresler, were true articles. Further, the evidence in the Greenbelt case clearly showed that no reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. This is not true in the article published about the Respondent where it clearly and succinctly stated that the Respondent had been charged with the crime of perjury, and was a news story completely unrelated to any of the previous articles or discussions previously reported by the Petitioner newspaper, which was not the factual situation in the *Greenbelt v. Bresler* case.

It is very clear from the evidence in this cause that the conduct of the Petitioners in reporting erroneous news stories about the Respondent prior to the publication of the defamatory false news article the fact that the news stories were erroneous and this fact had been called to the attention of the Petitioners by the Respondent before the publication of the defamatory false news article. The further fact that Petitioners had already published a story in normal news form as to the actual incident involved in the news two and one-half months before the defamatory false news article can lead but

to one conclusion — that the defamatory false news article was published with malice, that is with the knowledge that it was false or with the reckless disregard of whether it was false or not. *(New York Times Co. v. Sullivan)*

2. The Rule Allowing Recovery by Public Figures Applies

The facts in this cause clearly show that the rule laid down in *Curtis Publishing Company v. Butts* 388 U.S. 130 at 155, applies to this cause, which states:

> "We consider and would hold that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

An examination of the facts in this cause shows first the court event of the passing over of the James Damron case occurred on the 5th day of April. The defamatory false newspaper article was published on the 18th day of April, 13 days later. Obviously the news was not hot news, that is news that required immediate dissemination, because first, the status of the indictment for perjury had already been published by the Petitioners on January 30, 1966, and the mere fact that a case was passed over affecting an unknown individual could scarcely be considered as a matter necessitating rapid dissemination in a series of events, but was an extreme departure from accepted publishing standards as shown by the fact that a name was changed by Meier, the area editor, without first checking, which was contrary to accepted publishing standards. Further, the unexplained occurrence by the news reporter, Lucy Ware, when she testified

that if a news story was not of particular news interest, she generally typed it and mailed it in since the mail service was one day, but if it was of *particular news value* she phoned it in early in the mornings, (TT. 150, A. 72) and she telephoned this news story in even though it was 13 days old and not a matter of public interest.

Therefore, the distinction made in allowing Wallace Butts to recover in his action against *Curtis Publishing Company* is clearly applicable to this cause, because there is a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

3. Free Elections and False Defamations

Article IV, Section 4, of the *United States Constitution* guarantees the republican form of government. The XVth Amendment and the XIXth Amendment to the *United States Constitution* provide that the rights of citizens in the United States to vote shall not be denied or abridged on account of race, color, sex or previous conditions of servitude. Article III, Section 26, of the *Florida Constitution* in effect at the time the defamatory falsehood was published provided laws shall be passed regulating elections, and prohibiting under adequate penalties, all undue influence thereon from power, bribery, tumult or other improper practice. The Florida Legislature at the time the defamatory falsehood was published had enacted and there was in effect *Section 104.061(1) Florida Statutes*, which provided:

> "Whoever by bribery, menace, threat or other corruption whatsoever, either directly or indirectly, attempts to influence or *deceive* any elector in giving his vote or ballot or preparing the same, or to deter him from giving the same, or disturbs or interferes with him in

the free exercise of the right of suffrage at any election shall, upon conviction, be guilty of a misdemeanor on the first conviction and a felony on the second conviction." (Emphasis supplied)

It is clear, therefore, that the right to free elections unfettered by falsehoods calculated to defame the reputation of a candidate is a true right protected by the United States Constitution, Florida Constitution and Florida Statutes.

An examination of the facts in this cause clearly shows that the Respondent, as a candidate, was running for the public office of tax assessor in an election to be held on May 3, 1966, when the defamatory falsehood was published on April 18, 1966. The facts further show that prior to this publication the Respondent had always been a successful candidate in elections and received voter acceptance by large margins. Immediately after the publication of this article, although a correction was printed, the Respondent was confronted with a very cold reaction from the voting public and was miserably defeated in this election, and the general comment indicated after publication of this falsehood that the voters didn't care to vote for a man like that, indicating that he had been degraded in the public eye, that he had lost general public acceptance, that he must be a nut running for public office when under federal indictment, all of this occuring and the testimony showing that the contents of this false defamatory news article traveled like wild fire.

How then can the constitutional guarantees of free government and free elections be protected if newspaper journalism is to be afforded the opportunity to publish defamatory falsehoods which obviously bring defeat of a candidate and degrade him in the eyes of the voting public? What better opportunity can be afforded to the press to dictate and choose

future public office holders if they be allowed to excuse themselves for such defamatory falsehoods on the flimsy excuse, which obviously in this case isn't even true, that the area editor had a mental aberration? The condition of mind can only be determined as a matter of professional opinion and then is only the opinion of the psychiatrist and not a proof of an actual fact. We cannot proceed in the area of free government by the people and for the people if we void the responsibilities of the press to the voting public under the right of freedom of the press which should not be an absolute right without responsibility.

Petitioners have argued that the defamatory falsehood which was published about the Respondent should be allowed as a matter of public interest. (Respondent's Exhibit 3, A. 84) Such an argument is obviously fallacious in that if this be true the press could print any falsehood it so desired to generate the public interest and not be liable therefore and if carried to its ultimate extent would create chaos in the minds of the citizens of this country to such an extent as to abrogate all the rights guaranteed to the citizens of this country under the Constitution of the United States.

The various decisions cited by Petitioners subsequent to the *New York Times Co. v. Sullivan* decision, which are predicated upon this decision, are designed to augment the right of free discussion in matters of public interest and public issues. Free discussion contemplates ample time to resolve these issues in the minds of each individual, but how can such an issue as a defamatory falsehood charging a candidate for public office of having been indicted with the crime of perjury be amply discussed, amplified and resolved in the mind of an individual voter or all voters, as it may be, within the period of 15 days and as the record shows in this cause, even though a correction was printed by Petitioners, it had little, if any,

effect on the minds of the general voting public at this crucial time just before election.

The example shown in this cause of how the right to free elections may be so easily violated can lead to the one conclusion that the standard of care required of the news media at the time of election must necessarily be much higher and the publisher who holds himself or his agents out as the author and composer has no right to publish falsehoods of a personal nature without being liable in damages therefor.

4. Official Conduct, Public Interest and Perjury

The rule laid down in *New York Times Co. v. Sullivan* specified unequivocally that it was limited to the area of *official conduct* of public officials in libel actions. Had this Court not intended to confine this rule to official conduct the rule would not have been so written and amplified by the footnote thereto pointing out that official conduct relates to the performance of official duties. (*New York Times Co. v. Sullivan* 376 U.S. 254 at 283 note 23)

This point was further clarified by the concurring opinion in *New York Times Co. v. Sullivan* of Justice Goldberg, in which Justice Douglas joined, which stated:

> "This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of press and of speech insures that government will respond to the will of the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society. The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by

> the First Amendment. This, of course, cannot be said 'where public officials are concerned or where public matters are involved . . . One main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues. Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it.' Douglas, The Right of the People (1958), p. 41." *New York Times Co. v. Sullivan* 376 U.S. 301-302.

Petitioners have attempted to draw an analogy between civil rights and election campaigns and a defamatory falsehood charging that the Respondent had been indicted for perjury on a matter which was totally unrelated to the public office held or sought by the Respondent. The defamatory falsehood was directed toward the personal conduct of the Respondent, and, therefore, is within the qualified area of private conduct of a public official lying outside of the rule set down in the *New York Times Co. v. Sullivan.*

Although Petitioners are correct that the term official conduct does not apply as such to a public figure, the decisions of this Court and decisions in which this Court has denied Certiorari on the public figure or public official concept relate to matters directly involved as a public issue or a matter of public interest. *(All Diet Foods v. Time* 290 N.Y. Supp. 2d. 445, retail health foods and special diet food stores and restaurants; *Associated Press v. Walker* 388 U.S. 130, civil rights; *Beckley Newspapers Corp. v. Hanks* 389 U.S. 81, *Garrison v. Louisiana* 379 U.S. 64, *Henry v. Collins* 380 U.S. 356, *New York Times v. Connor* 365 F. 2d. 567, *New York Times Co. v. Sullivan* 376 U.S. 254, *Rosenblatt v. Baer* 383 U.S. 75, *St. Amant v. Thompson* 390 U.S. 727, *Washington Post v. Keogh* 365 F. 2d. 965, conduct of a public official in the conduct of his public office; *Bon Air v. Time*

295 F. Supp. 704, well known hotel which accommodates hundreds of visitors in a master's golf tournament; *Curtis Publishing Co. v. Butts* 388 U.S. 130, the activities of a nationally known football coach and the conduct of his nationally known football team affairs; *Farnsworth v. Tribune* 253 N.E. 2d. 408, quackery and public health; *Fotochrome v. N. Y. Herald Tribune* 305 N.Y. S. 2d. 168, matters relating to a public corporation's stock; *Greenbelt v. Bresler* (5-18-70) Case No. 413 October Term, 1969, conduct relating to matters in public controversy; *Time v. Hill* 385 U.S. 374, a statute relating to the invasion of right of privacy; *Time v. McLaney* 406 F. 2d. 565, a professional gambler who injected himself in an election in a small foreign country; *United Medical v. C.B.S.* 404 F. 2d. 706, mail order medical testing laboratories; *Wasserman v. Time* (C.A.D.C. 3-3-70), an attorney photographed with men involved in mafia activity; *Merritt-Chapman v. Associated Press* 33 Fla. Supp. 102, the financial affairs of a public corporation.)

No where in their brief have Petitioners related the crime of perjury as a pre-existing topic subject to discussion as a public matter, public issue or public interest and subject to public debate. Rather, Petitioners argue that once the defamatory falsehood has been published it then becomes a matter of public interest which is the natural consequence of such an act where it relates to a public figure or public official even though the act charged is totally unrelated to any of the activities of such an individual.

Therefore, there is but one conclusion, that the *New York Times Co. v. Sullivan* rule and the *Associated Press v. Walker* rule can have no application to the facts involved in this cause.

5. Miscellaneous Considerations

The Petitioners complain of the fact that this cause of action was filed in Marion County, Florida, the location of the principal office of the Petitioner, Ocala Star-Banner, rather than in Citrus County, yet the record is void of any motion on the part of the Petitioners to have the venue of this action changed as required by *Florida Rules of Civil Procedure.* (A. 23)

The Petitioners make reference in their brief to a decision in *Merritt-Chapman v. Associated Press* 33 Fla. Supp. 102, in support of their argument, however, Petitioners fail to point out that this decision was rendered on primary facts which were not disputed and showed that the newspaper acted in good faith and without any malice.

The Petitioners indicate on Page 15 of their brief their understanding of how the jury verdict was determined in this cause, however, their contention is not supported by the record nor any evidence of Petitioners' attorney having conferred with a member of the jury on how they reached their verdict. Respondent's attorney has had no direct or indirect contact with members of the jury and, therefore, he does not know how the jury verdict was determined.

CONCLUSION

Judgment in this cause must be affirmed for the reasons herein stated.

Respectfully submitted,

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